

# **United States District Court**

For the Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 STRAWFLOWER ELECTRONICS, INC., No. C-05-0747 MMC

**Plaintiff,**

No. C-05-0747 MMC

13 v.  
14 RADIOSHACK CORPORATION.

## **ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS; VACATING HEARING**

## Defendant

(Docket No. 40)

18 Before the Court is defendant RadioShack Corporation's ("RadioShack") motion,  
19 filed August 18, 2005, to dismiss the second through sixth causes of action asserted  
20 against it in plaintiff Strawflower Electronics, Inc.'s ("Strawflower") Second Amended  
21 Complaint. Strawflower has filed opposition to the motion, to which RadioShack has  
22 replied. Having considered the papers filed in support of and in opposition to the motion,  
23 the Court finds the motion appropriate for resolution without oral argument, see Civil L.R. 7-  
24 1(b), and hereby VACATES the September 23, 2005 hearing on the matter. For the  
25 reasons set forth below, RadioShack's motion to dismiss is GRANTED in part and DENIED  
26 in part.

## BACKGROUND

28 Strawflower alleges that, in December 1979, it entered into a contract with

1 RadioShack (“Contract”), by which RadioShack authorized Strawflower to sell RadioShack  
 2 products and to use the RadioShack name in the operation of a retail store in Half Moon  
 3 Bay, California. (See Second Amended Complaint (“SAC”) ¶ 6.) According to Strawflower,  
 4 it opened the Half Moon Bay store in December 1979, and used the RadioShack name and  
 5 sold RadioShack products for approximately 25 years. (See id. ¶ 8.) Strawflower alleges  
 6 that, pursuant to the Contract terms, RadioShack was permitted to terminate the Contract  
 7 only if “(1) [Strawflower] fail[ed] to purchase from [RadioShack] a minimum of \$10,000  
 8 worth of merchandise, at [Strawflower]’s cost . . . in any one year . . . OR (2) [Strawflower]  
 9 fail[ed] to reasonably serve [its] market area with products reasonably expected to be  
 10 carried by RADIO SHACK Authorized Sales Centers in locations of similar market size.”  
 11 (See id. ¶ 9.)

12 According to Strawflower, RadioShack, prior to and during 2004, sought to terminate  
 13 the Contract by invoking both grounds for termination set forth in the Contract; Strawflower  
 14 opposed termination, contending that it purchased in excess of \$10,000 worth of  
 15 merchandise every year, and that it had “reasonably served” its market area. (See id.  
 16 ¶ 10.) Strawflower alleges that when it asked RadioShack to explain the factual basis for  
 17 its claim that cause existed to terminate the Contract, RadioShack refused to respond,  
 18 provided inconsistent grounds for termination of the Contract, or provided grounds for  
 19 termination that are not set forth in the Contract; thereafter, on or about January 17, 2005,  
 20 RadioShack sent Strawflower a letter stating that RadioShack was terminating the Contract  
 21 “for cause,” effective February 17, 2005. (See id. ¶ 11.)

22 Strawflower further alleges that, within the past four years, RadioShack implemented  
 23 a new policy that required Strawflower to buy non-RadioShack-branded products directly  
 24 from RadioShack, rather than from independent distributors. (See id. ¶ 40.) According to  
 25 Strawflower, the policy required Strawflower to buy a certain percentage of both non-  
 26 RadioShack-branded products and RadioShack-branded products from RadioShack, or  
 27 face termination of the Contract. (See id.) In implementing this policy, RadioShack,  
 28 according to Strawflower, conditioned Strawflower’s ability to buy and sell RadioShack-

1 branded products, and Strawflower's right to use the RadioShack name, on Strawflower's  
2 buying non-RadioShack-branded products from RadioShack, instead of from independent  
3 distributors who sold the same products at lower cost. (See id. ¶ 46.) Strawflower  
4 contends this policy is harmful to competition and harmful to consumers because it  
5 precluded Strawflower from buying the non-RadioShack-branded products at the lowest  
6 price, and forced Strawflower to sell at higher prices to consumers. (See id. ¶ 48.)

7 Strawflower asserts seven causes of action against RadioShack: (1) breach of  
8 contract; (2) a claim for a declaratory judgment that RadioShack breached the Contract and  
9 that Strawflower did not breach the Contract; (3) a claim for a declaratory judgment that the  
10 Contract created a franchise relationship between Strawflower and RadioShack, pursuant  
11 to the California Franchise Relations Act (“CFRA”) (California Business and Professions  
12 Act § 20000 *et seq.*) and California Franchise Investment Law (“CFIL”) (California  
13 Corporations Code § 31000 *et seq.*); (4) breach of fiduciary duty; (5) illegal tying in violation  
14 of § 3 of the Clayton Act (15 U.S.C. § 14) and § 1 of the Sherman Act (15 U.S.C. § 1); (6)  
15 illegal tying in violation of the Cartwright Act (California Business and Professions Code §  
16 16727 *et seq.*); and (7) unfair competition in violation of California Business and  
17 Professions Code § 17200.

18 RadioShack now moves to dismiss the second through sixth causes of action for  
19 failure to state a claim, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.  
20 RadioShack does not move to dismiss the first cause of action, for breach of contract, or  
21 the seventh cause of action, for unfair competition in violation of § 17200.

## **LEGAL STANDARD**

23 A motion to dismiss under Rule 12(b)(6) cannot be granted unless "it appears  
24 beyond doubt that the plaintiff can prove no set of facts in support of his claim which would  
25 entitle him to relief." See Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Dismissal can be  
26 based on the lack of a cognizable legal theory or the absence of sufficient facts alleged  
27 under a cognizable legal theory. See Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699  
28 (9th Cir. 1990).

Generally, a district court, in ruling on a Rule 12(b)(6) motion, may not consider any material beyond the pleadings. See Hal Roach Studios, Inc. v. Richard Feiner And Co., Inc., 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990). Material that is properly submitted as part of the complaint, however, may be considered. See id. Documents whose contents are alleged in the complaint, and whose authenticity no party questions, but which are not physically attached to the pleading, also may be considered. See Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994). In addition, the Court may consider any document “the authenticity of which is not contested, and upon which the plaintiff’s complaint necessarily relies,” regardless of whether the document is referred to in the complaint. See Parrino v. FHP, Inc., 146 F.3d 699, 706 (9th Cir. 1998). Finally, the Court may consider matters that are subject to judicial notice. See Mack v. South Bay Beer Distributors, Inc., 798 F.2d 1279, 1282 (9th Cir. 1986).

In analyzing a motion to dismiss, the Court must accept as true all material allegations in the complaint, and construe them in the light most favorable to the nonmoving party. See NL Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). The Court may disregard factual allegations if such allegations are contradicted by the facts established by reference to exhibits attached to the complaint. See Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987). Conclusory allegations, unsupported by the facts alleged, need not be accepted as true. See Holden v. Hagopian, 978 F.2d 1115, 1121 (9th Cir. 1992).

## DISCUSSION

## A. Breach of Fiduciary Duty

23 RadioShack argues that Strawflower's claim for breach of fiduciary duty is subject to  
24 dismissal because that there is no fiduciary relationship between the parties as a matter of  
25 law. Strawflower alleges that a fiduciary relationship existed between it and RadioShack  
26 because they were "business partners and/or joint venturers," (see SAC ¶ 30), and  
27 because "RadioShack insisted, demanded and required that Strawflower provide  
28 RadioShack with confidential business information, which RadioShack claimed it would

1 then use for the joint benefit of Strawflower and RadioShack.” (See id. ¶ 31.)

2       **1. Business Partners**

3           By statute, a fiduciary relationship exists among partners in a business partnership.  
 4 See Cal. Corp. Code § 16404. “A partnership is defined by statute . . . as an association of  
 5 two or more persons to carry on as co-owners a business for profit.” See Persson v. Smart  
 6 Inventions, Inc., 125 Cal. App. 4th 1141, 1157 (2005) (citing Cal. Corp. Code § 16202(a))  
 7 (emphasis added).

8           Defendants argue that the lack of a partnership is clear from the face of the  
 9 Contract, which states that the RadioShack store at issue is owned and operated solely by  
 10 Strawflower. As defendants note, the Contract expressly provides: “The management,  
 11 operation and ownership of the store are acknowledged to be solely under the control of  
 12 [Strawflower].” (See Fillerup Decl. in Support of Plaintiff’s Motion For Leave to File Second  
 13 Amended Complaint, Ex. A-1 (“Contract”) § III.)<sup>1</sup> The Contract also identifies the store as  
 14 “owned” by Strawflower, (see id. § I.A), and further provides that Strawflower may not use  
 15 the RadioShack trademark “unless it is clearly indicated that the store is owned and  
 16 operated by [Strawflower].” (See id. § I.D). Strawflower also agreed “not to do anything  
 17 that would imply or indicate” that RadioShack “in any manner, either directly or indirectly  
 18 owns, controls, [or] operates” Strawflower or its store. (See id.) Although Strawflower  
 19 correctly notes that the existence of a partnership is a question of fact, see, e.g., Persson,  
 20 125 Cal. App. 4th at 1157, Strawflower fails to allege or argue any facts that would support  
 21 a finding that RadioShack is a co-owner of Strawflower’s RadioShack store.

22           Accordingly, the Court will GRANT defendants’ motion to dismiss Strawflower’s  
 23 claim for breach of fiduciary duty to the extent it is based on fiduciary duties created by a

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25           <sup>1</sup> Although the Second Amended Complaint states that the Contract is attached  
 26 thereto, it is not attached to the copy of the Second Amended Complaint that was filed with  
 27 the Court. It was, however, attached to the copy of the Second Amended Complaint  
 28 Strawflower submitted to the Court in connection with its motion for leave to file the Second  
     Amended Complaint. In any event, the Court may consider the Contract in ruling on the  
     instant motion to dismiss, regardless of whether it is attached to the Complaint. See  
     Branch v. Tunnell, 14 F.3d at 454.

1 partnership.

2           **2. Joint Venture**

3           A fiduciary relationship exists among parties to a joint venture. See Oakland  
 4 Raiders v. National Football League, 131 Cal. App. 4th 621, 632 (2005). “A joint venture, of  
 5 necessity, ‘requires an agreement under which the parties have (1) a joint interest in a  
 6 common business, (2) an understanding that profits and losses will be shared, and (3) a  
 7 right to joint control.’” See id. at 637-38 (citing Ramirez v. Long Beach Unified School Dist.,  
 8 105 Cal. App. 4th 182, 193 (2002)).

9           Defendants argue that Strawflower’s claim for breach of fiduciary duty is subject to  
 10 dismissal, to the extent it is based on duties created by a joint venture, because there is no  
 11 allegation that the parties intended to share in the profits and losses incurred in the  
 12 operation of Strawflower’s RadioShack store, and no allegation that the parties intended to  
 13 share control of the operation of the store. The Court need not reach the issue of control,  
 14 as the Contract does not provide for the sharing of profits and losses, and Strawflower  
 15 neither alleges nor argues that the parties otherwise agreed to share profits and losses  
 16 incurred in the operation of Strawflower’s store. Rather, Strawflower argues that an  
 17 agreement to share profits and losses is not a prerequisite to finding the existence of a joint  
 18 venture. As noted above, however, the California Court of Appeal has held that “an  
 19 understanding that profits and losses will be shared” is a requirement of a joint venture.  
 20 See id.

21           Accordingly, the Court will GRANT defendants’ motion to dismiss Strawflower’s  
 22 claim for breach of fiduciary duty to the extent it is based on fiduciary duties created by a  
 23 joint venture.<sup>2</sup>

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24           <sup>2</sup> Although Strawflower does not allege in its complaint that a fiduciary relationship  
 25 arose as a result of a franchisor-franchisee relationship between RadioShack and  
 26 Strawflower, the Court notes that Strawflower does suggest in its opposition that such a  
 27 duty exists. (See Opp. at 22-23.) The Ninth Circuit repeatedly has held, however, that a  
 28 fiduciary relationship is not created by a franchisor-franchisee relationship. See, e.g., Boat  
& Motor Mart v. Sea Ray Boats, Inc., 825 F.2d 1285, 1292 (9th Cir. 1987) (holding “[t]he  
 relation between a franchisor and a franchisee is not that of a fiduciary to a beneficiary” and  
 that “[t]he California Franchise Relations Act has not imposed additional fiduciary duties on

### **3. Confidential Relationship**

2 As noted, Strawflower also alleges that a fiduciary relationship was created between  
3 it and RadioShack because “RadioShack insisted, demanded and required that Strawflower  
4 provide RadioShack with confidential business information, which RadioShack claimed it  
5 would then use for the joint benefit of Strawflower and RadioShack.” (See SAC ¶ 31.)  
6 Strawflower alleges that said confidential information included “customer information, sales  
7 information, and marketing information,” which Strawflower states it would not have  
8 provided to RadioShack “but for the fiduciary duty that existed.” (See id.) Strawflower  
9 alleges that RadioShack “used such confidential information for its own benefit and not for  
10 the joint benefit of RadioShack and Strawflower.” (See id. ¶ 32.) RadioShack argues that  
11 Strawflower’s breach of fiduciary duty claim is subject to dismissal, to the extent it is based  
12 on a confidential relationship between the parties, because Strawflower has not alleged a  
13 relationship of the type that gives rise to a fiduciary duty.

14        “[O]ne standing in a confidential or fiduciary relationship with another is subject to  
15 liability to the other for harm resulting from a breach of duty imposed by the relation.” See  
16 Richelle L. v. Roman Catholic Archbishop, 106 Cal. App. 4th 257, 273 (2003) (internal  
17 quotation and citation omitted). The term “confidential relationship” refers to “an unequal  
18 partnership between parties in which one surrenders to the other some degree of control  
19 because of the trust and confidence he reposes in the other.” See id. at 272 n.6. “A  
20 confidential relationship cannot be imposed on an individual, but must be voluntarily  
21 accepted” and “is not created simply by the receipt of confidential information.” See id.  
22 The “essential elements” of a “confidential relation that gives rise to a fiduciary duty” are:  
23 “1) [t]he vulnerability of one party to the other which 2) results in the empowerment of the  
24 stronger party by the weaker which 3) empowerment has been solicited or accepted by the  
25 stronger party and 4) prevents the weaker party from effectively protecting itself.” See id.

27 the franchisor"); Walker v. KFC Corp., 728 F.2d 1215, 1221 n.5 (9th Cir. 1984) (holding  
28 California legislature, in enacting Franchise Investment Law, did not intend to impose fiduciary duty on franchisors).

1 at 272 (internal quotation and citation omitted). “The vulnerability that is the necessary  
 2 predicate of a confidential relation, and which the law treats as absolutely essential, usually  
 3 arises from advanced age, youth, lack of education, weakness of mind, grief, sickness or  
 4 some other incapacity.” *Id.* at 273 (internal quotation and citation omitted).

5 In Persson v. Smart Inventions, Inc., a case involving negotiations over the buyout of  
 6 one 50% shareholder in a corporation by the other 50% shareholder, in which the selling  
 7 party contended key information was withheld by the other party, the California Court of  
 8 Appeal held that a confidential relationship giving rise to a fiduciary duty was not created  
 9 “during arms-length business negotiations between the parties,” finding the requisite  
 10 “vulnerability” lacking in such relationship. See Persson, 125 Cal. App. 4th at 1146, 1162.  
 11 Defendants argue that the instant transaction likewise was an arms-length business  
 12 transaction in which no “confidential relationship” arose.

13 Strawflower does not allege any facts in its Second Amended Complaint to suggest  
 14 that it suffered from the requisite “vulnerability.” Moreover, in its opposition, Strawflower  
 15 does not argue that it could amend the complaint to do so.

16 Accordingly, the Court will GRANT defendants’ motion to dismiss Strawflower’s  
 17 claim for breach of fiduciary duty to the extent it is based on fiduciary duties created by a  
 18 confidential relationship. As Strawflower has failed to adequately allege any basis for a  
 19 fiduciary relationship between the parties, Strawflower’s claim for breach of fiduciary duty  
 20 will be dismissed in its entirety.

21 **B. Antitrust Claims**

22 RadioShack moves to dismiss Strawflower’s claims for unlawful tying, brought under  
 23 the Clayton Act, Sherman Act, and Cartwright Act (collectively, “antitrust claims”), on two  
 24 separate grounds. First, RadioShack argues that the Court has already dismissed these  
 25 claims with prejudice. Second, RadioShack argues that the antitrust claims, on their merits,  
 26 fail to state a claim.

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28 **1. Prior Dismissal**

1       In Strawflower's First Amended Complaint, it asserted causes of action under the  
 2 Clayton Act, Sherman Act, and Cartwright Act, for unlawful tying. Although the claims were  
 3 not clearly pleaded, Strawflower, in opposition to RadioShack's motion to dismiss the  
 4 antitrust claims asserted in the First Amended Complaint, clarified that its antitrust claims  
 5 were based on "an illegal tying arrangement in which RadioShack's sale of RadioShack  
 6 branded products is tied to Strawflower's continued use of the RadioShack name." (See  
 7 Order Granting in Part and Denying in Part Motion to Dismiss, filed June 3, 2005, at 5.)  
 8 The Court granted RadioShack's motion to dismiss the antitrust claims, with prejudice,  
 9 holding that, under the facts alleged, the RadioShack trademark could not be considered a  
 10 separate product for purposes of a tying claim. (See id. at 6-7.)

11       In its Second Amended Complaint, Strawflower asserts a new theory in support of its  
 12 antitrust claims.<sup>3</sup> Rather than contending that RadioShack violated the antitrust laws by  
 13 tying the sale of RadioShack-branded products to the use of the RadioShack name,  
 14 Strawflower now contends that RadioShack violated the antitrust laws by (1) tying  
 15 Strawflower's purchase of RadioShack-branded products to Strawflower's purchase of non-  
 16 RadioShack-branded products; and (2) tying Strawflower's use of the RadioShack name to  
 17 the sale of non-RadioShack-branded products. (See SAC ¶¶ 49-50.)

18       The Court previously dismissed Strawflower's antitrust claims, with prejudice, based  
 19 on the theory then asserted. As Strawflower now asserts a new theory in support of its  
 20 antitrust claims, the Court's prior dismissal does not preclude Strawflower from asserting its  
 21 antitrust claims, as currently pleaded.

## 22           **2. Tying – Legal Standard**

23       The Supreme Court has held, with respect to the definition of tying, that "the  
 24 standards used by the [Sherman Act and Clayton Act] are the same." See Jefferson Parish  
Hospital District No. 2 v. Hyde, 466 U.S. 2, 23 n.39 (1984). Federal decisions interpreting

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27           <sup>3</sup> Contrary to RadioShack's argument, the doctrine of res judicata is inapplicable,  
 28 particularly in light of the Court's order of July 26, 2005, granting Strawflower leave to  
 amend.

1 the Sherman Act and Clayton Act with respect to tying likewise are applicable to tying  
 2 claims brought under the California Cartwright Act, as the sections of the Cartwright Act  
 3 addressing tying were modeled after the Sherman and Clayton Acts. See Hamro v. Shell  
 4 Oil Co., 674 F.2d 784, 786 (9th Cir. 1982). Accordingly, and because the parties treat the  
 5 antitrust claims interchangeably, the Court will analyze together all three antitrust claims  
 6 asserted by Strawflower.

7 “A tying arrangement is an agreement by a party to sell one product but only on the  
 8 condition that the buyer also purchases a different (or tied) product, or at least agrees that  
 9 he will not purchase that product from any other supplier.” Eastman Kodak Co. v. Image  
 10 Technical Services, Inc., 504 U.S. 451, 461 (1992) (internal quotation and citation omitted).  
 11 The Supreme Court has held that “[s]uch an arrangement violates § 1 of the Sherman Act if  
 12 the seller has appreciable economic power in the tying market and if the arrangement  
 13 affects a substantial volume of commerce in the tied market.” See id. “The essential  
 14 characteristic of an invalid tying arrangement lies in the seller’s exploitation of its control  
 15 over the tying product to force the buyer into the purchase of a tied product that the buyer  
 16 either did not want at all, or might have preferred to purchase elsewhere on different  
 17 terms.” Id. at 464 n.9 (internal quotation and citation omitted). “When such ‘forcing’ is  
 18 present, competition on the merits in the market for the tied item is restrained and the  
 19 Sherman Act is violated.” Id.; see also Paladin Associates, Inc. v. Montana Power Co., 328  
 20 F.3d 1145, 1159 (9th Cir. 2003) (holding elements of tying claim are: “(1) that there exist  
 21 two distinct products or services in different markets whose sales are tied together; (2) that  
 22 the seller possesses appreciable economic power in the tying product market sufficient to  
 23 coerce acceptance of the tied market; and (3) that the tying arrangement affects a not  
 24 insubstantial volume of commerce in the tied product market”) (internal quotation and  
 25 citation omitted).

### 26           **3. Separate Products**

27           As noted, Strawflower alleges that RadioShack engaged in unlawful tying by  
 28 conditioning Strawflower’s ability to purchase RadioShack-branded products and to use the

1 RadioShack trademark (the tying products) on its purchase of non-RadioShack-branded  
 2 products from RadioShack (the tied products).<sup>4</sup> (See SAC ¶¶ 49-50.)

3 RadioShack's first argument in support of dismissal is that Strawflower's new  
 4 allegations, as a legal matter, fare no better than those previously dismissed by the Court.  
 5 Strawflower previously argued that RadioShack unlawfully tied the use of its trademark to  
 6 Strawflower's sale of RadioShack-branded products; in other words, that RadioShack  
 7 permitted Strawflower to use the RadioShack name only if Strawflower sold certain  
 8 RadioShack products. The Court dismissed Strawflower's antitrust claims, as based on  
 9 that theory, because the Ninth Circuit has held that, under such circumstances, a  
 10 trademark may not be considered a separate product for purposes of a tying claim.

11 As discussed in this Court's previous order of dismissal, the Ninth Circuit, in Krehl v.  
 12 Baskin-Robbins Ice Cream Co., 664 F.2d 1348 (9th Cir. 1982), rejected the plaintiff's  
 13 argument therein that Baskin-Robbins' policy of conditioning the grant of a franchise upon  
 14 the purchase of ice cream exclusively from Baskin-Robbins constituted an unlawful tying of  
 15 the Baskin-Robbins trademark to the ice cream products the plaintiff was compelled to  
 16 purchase, in violation of the Sherman Act. See id. at 1352-54. The Ninth Circuit held that  
 17 in "a distribution type" franchise, such as that employed by Baskin-Robbins, "the franchised  
 18 outlets serve merely as conduits through which the trademarked goods of the franchisor  
 19 flow to the ultimate consumer" and the trademark in a distribution franchise "serves merely  
 20 as a representation of the end product marketed by the system." See id. at 1353-54. As  
 21 the Ninth Circuit observed, "[b]ecause the prohibition of tying arrangements is designed to  
 22 strike solely at the use of a dominant desired product to compel the purchase of a second  
 23 undesired commodity," there can be no claim for unlawful tying "where the trademark  
 24 serves only to identify the allegedly tied product." See id. at 1354; see also Hamro v. Shell

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26                  <sup>4</sup> Strawflower defines the term "RadioShack-branded product" to mean "a product  
 27 with a label and packaging bearing the name 'RadioShack.'" (See SAC ¶ 37.) By contrast,  
 28 a "non-RadioShack-branded product" is "a product not produced by RadioShack and  
 bearing some name other than RadioShack on the label and packaging, for instance,  
 Hewlett-Packard, Lexmark, or Eveready." (See id.)

1     Oil Co., 674 F.2d at 786-87 (rejecting plaintiff's claim that Shell engaged in unlawful tying in  
2 violation of Cartwright Act by authorizing plaintiff to use Shell's trademark at his service  
3 station only if he purchased Shell gasoline; holding "as a matter of law the Shell trademark  
4 and Shell gasoline are not separate and distinct products"). Consequently, this Court found  
5 that any requirement that Strawflower purchase RadioShack-branded products in order to  
6 use the RadioShack trademark fell squarely within the holdings of Krehl and Hamro and did  
7 not state a claim for unlawful tying in violation of the antitrust laws. (See Order Granting in  
8 Part and Denying in Part Motion to Dismiss, filed June 3, 2005, at 5-8.)

9         In the instant complaint, Strawflower alleges that RadioShack is tying Strawflower's  
10 ability to sell RadioShack-branded products and its use of the RadioShack trademark to the  
11 purchase of non-RadioShack-branded products from RadioShack. (See SAC ¶¶ 49-50.)  
12 Contrary to RadioShack's argument, these allegations differ materially from the allegations  
13 in the First Amended Complaint. First, Strawflower's current allegation that RadioShack  
14 conditioned Strawflower's access to RadioShack-branded products on its purchase of non-  
15 RadioShack-branded products raises a classic tying claim. See Eastman Kodak, 504 U.S.  
16 at 461 (defining "tying arrangement" as "an agreement by one party to sell one product only  
17 on the condition that the buyer also purchases a different (or tied) product, or at least  
18 agrees that he will not purchase that product from any other supplier"). Additionally, as  
19 currently pleaded, the RadioShack trademark is not being used to identify the allegedly tied  
20 product and, consequently, the trademark may be considered to be a separate product for  
21 purposes of a tying claim. See Krehl, 664 F.2d at 1352 (noting that "under certain  
22 circumstances, a trademark may be sufficiently unrelated to the alleged tied product to  
23 warrant treatment as a separate item"); see also Siegel v. Chicken Delight, Inc., 448 F.2d  
24 43 (9th Cir. 1971) (finding unlawful tying in violation of Sherman Act where chicken  
25 franchise conditioned use of trademark on purchase of cooking equipment, packaging

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1 supplies, and mixes that were not manufactured by franchisor).<sup>5</sup>

2 Accordingly, the Court rejects RadioShack's argument that the legal issues  
 3 presented by Strawflower's current allegations are indistinguishable as a legal matter from  
 4 those presented by the allegations in its prior complaint.

5 **4. Purchase of Allegedly Tied Products**

6 RadioShack further argues that the antitrust claims are subject to dismissal because  
 7 Strawflower fails to allege that it purchased any of the allegedly tied products. Strawflower  
 8 alleges that during the first twenty years after the Contract was executed, it purchased non-  
 9 RadioShack-branded products only from independent distributors. (See SAC ¶ 39.)  
 10 Thereafter, Strawflower alleges, RadioShack implemented a policy requiring Strawflower to  
 11 buy non-RadioShack-branded products only from RadioShack. (See id. ¶ 40.) Strawflower  
 12 alleges that RadioShack terminated the Contract "based upon RadioShack's claim that  
 13 Strawflower has not complied with the policy." (See id. ¶ 47.) As RadioShack points out,  
 14 Strawflower does not allege that it, in fact, purchased any non-RadioShack-branded  
 15 products from RadioShack.

16 The Ninth Circuit has stated that an "essential" element of a tying claim is "proof that  
 17 the seller coerced a buyer to purchase the tied product." See Paladin Associates v.  
 18 Montana Power Co., 328 F.3d at 1159 (emphasis in original). In Paladin, the Ninth Circuit  
 19 further noted that "mere sales pressure" does not constitute evidence of the requisite  
 20 coercion. See id. at 1160. Because Paladin did not involve a plaintiff who refused to  
 21 purchase the tied product, the Ninth Circuit did not address whether evidence of acts that

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22  
 23       <sup>5</sup> Because the RadioShack trademark cannot be said to identify products sold in  
 24 RadioShack stores "bearing some name other than RadioShack on the label and  
 25 packaging, for instance, Hewlett-Packard, Lexmark, or Everready," (see id.), the instant  
 26 case is distinguishable from cases cited by RadioShack in which the product at issue was  
 27 manufactured by a third party, but sold under the defendant's trademark, not under the  
 28 trademark of the manufacturer. See, e.g., Krehl, 664 F.2d at 1354 n.14 (ice cream sold  
under Baskin-Robbins trademark but not manufactured by Baskin-Robbins); Power Test  
Petroleum Distributors, Inc. v. Calcu Gas, 754 F.2d 91, 98 (2nd Cir. 1985) (gasoline sold  
under PowerTest trademark but not manufactured by PowerTest); Jack Walters & Sons  
Corp. v. Morton Building, Inc., 737 F.2d 698, 704 (7th Cir. 1984) (prefabricated building  
 sold under Morton trademark although all components not manufactured by Morton).

1 could be described as attempted coercion were sufficient to state a tying claim. Other  
 2 circuits, however, have held that no tying claim can be stated where the plaintiff refused to  
 3 purchase the tied product. See, e.g., Famous Brands, Inc. v. David Sherman Corp., 814  
 4 F.2d 517, 523 (8th Cir. 1987) (citing Unijax, Inc. v. Champion Int'l, Inc., 683 F.2d 678, 685  
 5 (2nd Cir. 1982) ("Actual coercion by the seller that in fact forces the buyer to purchase the  
 6 tied product is an indispensable element of a tying violation.")). Additionally, a leading  
 7 antitrust treatise concurs that "an express tying contract that is proposed to buyers but  
 8 rejected by them does not constitute a tie" and that "the mere termination or rejection of a  
 9 dealer or customer who refuses to comply with a tie" is not unlawful tying. See Areeda,  
 10 Elhauge, and Hovenkamp, Antitrust Law, §§ 1753a, 1753f (2d ed. 2004).

11 In its opposition, Strawflower states that it did purchase non-RadioShack-brand  
 12 products from RadioShack, although it did not purchase enough of the products to satisfy  
 13 RadioShack. (See Opp. at 11; see also Fillerup Decl. Ex. A (Mackintosh Decl. ¶ 11.) In  
 14 reply, RadioShack argues that Strawflower's purchase of some non-RadioShack products  
 15 from RadioShack is not sufficient to support an antitrust claim if Strawflower did not  
 16 purchase the percentage of such products required by RadioShack. This argument was  
 17 not addressed in RadioShack's opening brief, however, and Strawflower has not had an  
 18 opportunity to respond to it.

19 Accordingly, the Court will GRANT RadioShack's motion to dismiss Strawflower's  
 20 antitrust claims, for failure to allege actual purchase, but will afford Strawflower leave to  
 21 amend its antitrust claims to allege that it purchased non-RadioShack-branded products  
 22 from RadioShack. Thereafter, if RadioShack still wishes to move to dismiss based on the  
 23 argument raised in its reply, it may do so.

## 24           **5. Market Power**

25 As an additional ground for dismissal of the antitrust claims, RadioShack argues that  
 26 Strawflower has failed to adequately allege that RadioShack possesses the requisite  
 27 market power with respect to any of the alleged tying products. As noted, Strawflower  
 28 alleges the tying products are RadioShack-branded products and the RadioShack

1 trademark. (See SAC ¶¶ 49-50.)

2 The Ninth Circuit has held that an essential element of a tying claim is “that the seller  
 3 possesses appreciable economic power in the tying product market sufficient to coerce  
 4 acceptance of the tied market.” See Paladin Associates, Inc. v. Montana Power Co., 328  
 5 F.3d at 1159. “Market power is the power to force a purchaser to do something that he  
 6 would not do in a competitive market.” See Eastman Kodak, 504 U.S. at 464 (internal  
 7 quotation and citation omitted). “The existence of such power ordinarily is inferred from the  
 8 seller’s possession of a predominant share of the market.” See id.

9 Strawflower does not allege that RadioShack has a predominant share of the market  
 10 for any of the products alleged to be RadioShack-branded products, including “batteries,  
 11 ionizers, power supplies, toys, and massagers.” (See SAC ¶ 49.) Rather, Strawflower  
 12 alleges it “spent the past 25 years and substantial time and money in developing the  
 13 RadioShack name and the market for RadioShack products,” that this investment “locked  
 14 Strawflower into a relationship with RadioShack,” and that “RadioShack took advantage of  
 15 Strawflower’s locked-in position” by initiating a new policy requiring Strawflower to  
 16 purchase non-RadioShack-branded products only from RadioShack. (See SAC ¶ 51.)

17 Plaintiffs rely on Eastman Kodak, in which the Supreme Court addressed this  
 18 “lock-in” theory of market power. In Eastman Kodak, the issue was whether Eastman  
 19 Kodak had unlawfully tied the sale of service for Kodak copying machines to the sale of  
 20 parts for such machines. See id. at 459. Eastman Kodak argued that because it lacked  
 21 market power in the market for the machines themselves, it could not be found to have  
 22 market power in the “aftermarket” for service and parts for the machines, as a matter of  
 23 law. See id. at 456. The Supreme Court rejected the argument. The Supreme Court first  
 24 noted that plaintiffs had submitted evidence that Kodak did in fact have market power in the  
 25 parts market. See id. at 464-65. Consequently, the Supreme Court held, Kodak could not  
 26 demonstrate it was entitled to summary judgment unless it showed that despite such  
 27 evidence, “an inference of market power [was] unreasonable.” See id. at 469. The  
 28 Supreme Court observed that Kodak’s theory, “that lack of power in the equipment market

1 necessarily precludes power in the aftermarket," rested on the assumption that if Kodak  
 2 raised its prices for parts and service above competitive levels, customers would stop  
 3 buying Kodak equipment. See id. at 469-70. The Supreme Court found, however, that "[i]f  
 4 the cost of switching is high, consumers who already have purchased the equipment, and  
 5 thus are 'locked in,' will tolerate some level of service-price increases before changing  
 6 equipment brands" and, consequently, "a seller profitably could maintain supracompetitive  
 7 prices in the aftermarket if the switching costs were high relative to the increase in service  
 8 prices, and the number of locked-in customers were high relative to the number of new  
 9 purchasers." See id. at 475. Because the plaintiffs presented evidence that switching  
 10 costs for Kodak equipment owners were very high, the Supreme Court concluded "a  
 11 question of fact" existed as to "whether information costs and switching costs foil the simple  
 12 assumption that the equipment and service markets act as pure complements to each  
 13 other." See id. at 477. Eastman Kodak thus suggests that a plaintiff may prove market  
 14 power by showing such plaintiff was economically "locked in" to a business relationship with  
 15 the defendant. See also Subsolutions, Inc. v. Doctor's Associates, Inc., 62 F. Supp. 2d  
 16 616, 625-26 (D. Conn. 1999) (holding plaintiff adequately alleged market power by  
 17 reference to Eastman Kodak lock-in theory).

18 In relying on the Eastman Kodak "lock-in" theory to prove the defendant has the  
 19 requisite market power, a plaintiff still must allege, however, that the challenged activity  
 20 affected a substantial portion of the relevant market. See Universal Avionics Systems  
21 Corp. v. Rockwell Int'l Corp., 184 F. Supp. 2d 947, 955 (D. Ariz. 2001) (holding challenged  
 22 conduct must affect "substantial number of customers"); see also Areeda, Elhauge and  
 23 Hovenkamp, Antitrust Law, § 1740a (2d ed. 2004) (same). In Eastman Kodak, the  
 24 challenged conduct affected all customers who owned Kodak photocopiers and all  
 25 independent servicing organizations who serviced Kodak photocopiers; in Subsolutions, the  
 26 challenged conduct affected all Subway franchisees. See Eastman Kodak, 504 U.S. at  
 27 458, 477; see Subsolutions, 62 F. Supp. 2d at 620. Here, by contrast, Strawflower does  
 28 not allege that the challenged RadioShack policy applied to all RadioShack stores, but,

1 rather, alleges that "RadioShack implemented a policy that required Strawflower to buy  
 2 non-RadioShack-branded products directly from RadioShack." (See SAC ¶ 40 (emphasis  
 3 added).)

4 Accordingly, the Court will GRANT RadioShack's motion to dismiss Strawflower's  
 5 antitrust claims, for failure to adequately allege market power. The Court will, however,  
 6 afford Strawflower leave to amend.

7 **6. Antitrust Injury**

8 RadioShack's final argument in support of dismissal of the antitrust claims is that  
 9 Strawflower lacks standing to assert such claims because it has failed to allege that it  
 10 suffered antitrust injury.

11 A suit for violation of the Clayton Act or the Sherman Act may be brought by "any  
 12 person who shall be injured in his business or property by reason of anything forbidden in  
 13 the antitrust laws[.]" See 15 U.S.C. § 15.<sup>6</sup> A plaintiff, however, "must prove the existence  
 14 of antitrust injury, which is to say injury of the type the antitrust laws were intended to  
 15 prevent and that flows from that which makes defendants' acts unlawful." See Atlantic  
 16 Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334 (1990) (internal quotation and  
 17 citation omitted; emphasis in original). "[I]njury, although causally related to an antitrust  
 18 violation, nevertheless will not qualify as 'antitrust injury' unless it is attributable to an anti-  
 19 competitive aspect of the practice under scrutiny, since it is inimical to the antitrust laws to  
 20 award damages for losses stemming from continued competition." Id. (internal quotations  
 21 and citations omitted). "Where the defendant's conduct harms the plaintiff without  
 22 adversely affecting competition generally, there is no antitrust injury." See Paladin, 328

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23  
 24       <sup>6</sup> The Cartwright Act similarly confers standing on "any person who is injured in his  
 25 or her business or property by reason of anything forbidden or declared unlawful by [the  
 26 Cartwright Act], regardless whether such injured person deals directly or indirectly with the  
 27 defendant." See In re Napster, Inc. Copyright Litigation, 354 F. Supp. 2d 1113, 1125 (N.D.  
 28 Cal. 2005) (citing Cal. Bus. & Prof. Code § 16750(a).) As Strawflower correctly notes, the  
 definition of "antitrust injury" under California law is less restrictive than the federal  
 standard, in that California law expressly confers antitrust standing on persons who are  
 injured indirectly by the defendant's anticompetitive conduct. See id. As Strawflower  
 alleges that it was injured directly by RadioShack, however, the difference appears  
 immaterial for purposes of the instant motion, and no party argues to the contrary.

1 F.3d at 1158.

2 Here, Strawflower expressly alleges that RadioShack's requirement that Strawflower  
 3 purchase non-RadioShack-branded products only from RadioShack harmed competition  
 4 because, according to Strawflower, "it precluded Strawflower from buying non-RadioShack-  
 5 branded products at lower prices and on better terms from sellers other than RadioShack,  
 6 and it forced Strawflower to sell at higher prices to consumers." (See SAC ¶ 48.)  
 7 RadioShack argues that Strawflower nonetheless cannot show it suffered antitrust injury  
 8 because it has not alleged that it was coerced into buying undesired products from  
 9 RadioShack. As noted above, Strawflower states in its opposition that it did purchase such  
 10 products from RadioShack, and the Court will afford Strawflower leave to amend the  
 11 complaint to so allege.

12 Accordingly, the Court will GRANT RadioShack's motion to dismiss Strawflower's  
 13 antitrust claims, for failure to allege antitrust injury, with leave to amend.

14 **C. Declaratory Relief Claims**

15 RadioShack moves to dismiss or strike both of Strawflower's claims for declaratory  
 16 relief on the ground that such claims are duplicative of Strawflower's other claims.

17 By statute, the Court "may," but is not required to, "declare the rights and other legal  
 18 relations of any interested party seeking such declaration, whether or not further relief is or  
 19 could be sought." See 28 U.S.C. § 2201(a); see also Wilton v. Seven Falls Co., 515 U.S.  
 20 277, 282 (1995) (noting courts' discretion to entertain claim for declaratory judgment). Rule  
 21 57 of the Federal Rules of Civil Procedure provides that "[t]he existence of another  
 22 adequate remedy does not preclude a judgment for declaratory relief in cases where it is  
 23 appropriate." See Fed. R. Civ. Proc. 57. The Supreme Court has held, however, that a  
 24 court has the discretion to dismiss a claim for declaratory relief if "a declaratory judgment  
 25 would serve no useful purpose." See Wilton, 515 U.S. at 288.

26 **1. Second Claim For Relief**

27 Strawflower seeks, in its second claim for relief, a judgment declaring that  
 28 RadioShack breached the Contract, declaring that Strawflower did not breach the Contract,

1 and declaring any further relief arising out of the Contract that is “necessary, just and/or  
 2 proper.” (See SAC ¶ 18.) This claim, as defendants correctly note, is entirely duplicative of  
 3 Strawflower’s cause of action for breach of contract. As a separate claim for a declaratory  
 4 judgment on the issue serves “no useful purpose” in the instant litigation, the Court will  
 5 GRANT defendants’ motion to dismiss the second claim for relief.

6                   **2. Third Claim For Relief**

7                   Strawflower seeks, in its third claim for relief, a declaratory judgment that the parties  
 8 had a franchisor-franchisee relationship within the meaning of the CFIL and CFRA and that,  
 9 consequently, RadioShack was subject to all the duties and obligations of a franchisor  
 10 under those statutes. (See SAC ¶ 27.) Strawflower further alleges that RadioShack “failed  
 11 to comply with a franchisor’s obligations in connection with termination of a franchise.”  
 12 (See id. ¶ 25.)

13                   RadioShack argues that the third claim for relief should be dismissed as duplicative  
 14 of Strawflower’s claim for unfair competition in violation of § 17200. Strawflower alleges  
 15 that RadioShack engaged in unfair competition in violation of § 17200 by violating the CFIL  
 16 and CFRA, as well as by violating the Clayton Act, Sherman Act, and the Cartwright Act.  
 17 (See id. ¶¶ 58-59.) Because Strawflower has alleged multiple bases for liability under  
 18 § 17200, it is conceivable the Court could find that RadioShack engaged in unfair  
 19 competition without reaching the merits of Strawflower’s claim under the CFIL and CFRA.  
 20 Consequently, Strawflower’s claim for a declaratory judgment that the parties had a  
 21 franchisor-franchisee relationship within the meaning of the CFIL and CFRA and that,  
 22 consequently, RadioShack was subject to all the duties and obligations of a franchisor  
 23 under those statutes, (see SAC ¶ 27), is not necessarily duplicative of Strawflower’s  
 24 § 17200 claim.

25                   Accordingly, the Court will DENY RadioShack’s motion to dismiss the third claim for  
 26 relief.

27                   //

28                   **CONCLUSION**

1       For the reasons set forth above, RadioShack's motion to dismiss is hereby  
2 GRANTED in part and DENIED in part, as follows:

3           1. The motion to dismiss Strawflower's claim for breach of fiduciary duty is  
4 GRANTED, and said claim is DISMISSED with prejudice.  
5           2. The motion to dismiss Strawflower's antitrust claims is GRANTED, with leave to  
6 amend.

7           3. The motion to dismiss Strawflower's second claim for relief, for a declaratory  
8 judgment, is GRANTED.

9           4. The motion to dismiss Strawflower's third claim for relief, for a declaratory  
10 judgment, is DENIED.

11           5. Strawflower may file a Third Amended Complaint within 21 days of the date of  
12 this order. If Strawflower fails to timely file a Third Amended Complaint, all claims that have  
13 been dismissed with leave to amend will be dismissed with prejudice.

14           This order terminates Docket No. 40.

15           **IT IS SO ORDERED.**

16 Dated: September 20, 2005

  
MAXINE M. CHESNEY  
United States District Judge

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